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No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

A. Respondents Admit The Existence Of A Circuit Conflict Regarding Interpretation Of An ADAAG Regulation That Impacts How Places Of Assembly Are Constructed.

Stewmon v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), and *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), present a classic conflict between the nation's two largest circuit courts of appeals. The conflict is significant, irreconcilable, and, for builders everywhere, deplorable. It places basic engineering decisions for all places of assembly governed by the Americans with Disabilities Act in question and destroys any reasonable expectation that those investing millions of dollars in construction projects may rely upon published federal construction standards. Respondents admit the existence of the circuit split, as they must, given the express acknowledgments of conflict contained in both the *Stewmon* majority and dissenting opinions. *See Stewmon*, 339 F.3d at 1133 n.9 (B. Fletcher, J.); *id.* at 1133 (Kleinfeld, J., dissenting).

Respondents' argument that review should be denied because the *Stewmon* decision was "essentially interlocutory" (Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Respondents' Brief") at 7) deserves little comment. The Ninth Circuit reversed the district court's final judgment in favor of Regal and *issued express instructions to grant summary judgment in favor of Respondents. See Stewmon*, 339 F.3d at 1133.[1]

As Regal and the *amici* make clear, this Court's review of *Stewmon* is urgently needed. Under the circumstances here, the Court should not delay review in order to allow the DOJ to "weigh in" on the Petition. The Department has already had ample opportunity to do so. The Department needed no

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1. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), is inapposite because the Fourth Circuit decision from which certiorari was sought made no ultimate determination on the merits and issued no similar instructions to enter judgment. *See United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (affording the Commonwealth the opportunity to change its policies on admitting women to VMI, establishing parallel institutions or parallel programs, or other options).

invitation to file its *amicus curiae* brief in the court below, nor did it hesitate to appear for oral argument. In briefing, argument, decision, and dissent, the DOJ's interpretation has consistently been the dominant issue. Furthermore, Regal not only served the Department with its Petition, but also provided the Department with a courtesy electronic copy of the briefing *before* it was filed and three days before the Petition was docketed. The Department has consistently, intensely, and even opportunistically participated in numerous cases concerning Section 4.33.3 of ADAAG and small theater venues, including appearances as party or *amicus curiae* in the First, Second, Third, Fifth, Sixth, and Ninth Circuits. This *five-year* campaign of litigation, designed to impose new law without compliance with the Administrative Procedure Act, is discussed at length in Regal's Petition and the various *amici curiae* briefs filed in this case by Cinemark USA, Inc., AMC Entertainment, Inc., Loew's Cineplex Entertainment Corp., Hoyts Theaters, Inc., and the National Association of Theatre Owners.[2]

In an apparent attempt to minimize the importance of the circuit conflict, Respondents focus much argument on their view that *Stewmon* is correct and *Lara* is wrong.[3] This undue focus on merits detracts not at all from the existence of the

2. Similarly, the Department fully participated in the court below, not as conventional "friend of the court" on a point of law, but as unabashedly partisan advocate on every issue presented. In this and other cases, the Department "introduced" evidence and asserted unvetted "industry" studies. It is the Department's arguments, not Stewmon's arguments, that dominate both the majority and dissenting opinions.

3. The Sixth Circuit's decision in *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003), decided after Regal's Petition was filed in this case, adds to the conflict. The Sixth Circuit expressly disagreed with the Fifth Circuit on the issue of whether providing "lines of sight comparable" under Section 4.33.3 of ADAAG requires consideration of "viewing angles." Far from presenting a unified position against the Fifth Circuit, as Respondents argue, the Sixth Circuit appears to differ from the Ninth Circuit on the scope of deference. *Compare United States v. Cinemark*, 348 F.3d at 579, *with Stewmon*, 339 F.3d at 1133. Moreover, the Sixth Circuit decision supports Petitioner's view that imposing the government's new standard retroactively would be inappropriate. *See United States v. Cinemark*, 348 F.3d at 581-82 (recognizing that Cinemark's reliance on a DOJ-approved state certification code weighs heavily in favor of prospective relief only); Regal's Petition at 26-29.

circuit conflict or the problems inherent in such conflict. By interpreting the same federal law differently, federal circuits and agencies are unduly burdening the building of places of public accommodation. Moreover, virtually all of Respondents' "correctness" arguments are predicated on the assumption that a "viewing angle" requirement "interpreted" from Section 4.33.3 of ADAAG exists in the first place, which is obviously a core area of disagreement in the cases.

Respondents' position is further undermined by stunning misstatements of fact. It is simply not correct that "over half" of the wheelchair seating at the subject movie theaters is located in the front row. Respondents' Brief at 3. More to the point, even where specific auditoria provide front row wheelchair spaces, most provide additional wheelchair seating in the third, fourth, or fifth rows as well. *The record is undisputed on this point.* Thus, and contrary to Respondents' assertions, individuals using wheelchairs need not sit in the front row in the majority of auditoria at issue *unless they choose to do so.* Similarly, *no* record evidence supports Respondents' statement that "the view [of the movie screen] from the sloped section is partially obstructed." *Id.* at 3 n.1. (Nor is vertical rise the only issue relevant to view over forward sitting patrons as implied by Respondents in footnote 1 of their Brief.) The record is uncontested that all wheelchair seating locations at issue in this case provide unobstructed views to the movie screen.[4]

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4. Furthermore, and as elsewhere acknowledged, these theaters were early versions of the "stadium-style" design. As Regal and others refined their designs (*see, e.g.*, NATO *Amici Curiae* Brief at 4), few, if any, wheelchair seating was placed in the front row. Respondents' reports of viewing angles of "24 to 60 degrees" (Respondents' Brief at 3-4) are also misleading, since these angles were measured from the seats to the *top* of the movie screen, as opposed to a natural focal point at or near the center of the movie screen. Respondents also fail to mention that there is no record evidence establishing that the disputed "SMPTE guideline" they cite (*id.* at 5) constituted industry practice, or was even generally known to the industry. SMPTE itself cautioned that its "guideline" was only intended to be "tutorial," conceded that it may not be technically adequate, opined that enforcement of it may not be "fair," and ultimately repealed the guideline in March 2003. Objections to the SMPTE guideline were never ruled on by the district court because summary judgment in favor of Regal made evidentiary issues irrelevant.

Despite the fact that the two largest circuit courts in the nation are irreconcilably opposed on the core issue, Respondents illogically suggest that "further percolation in the lower courts is appropriate" and "the conflict in the circuits may well resolve itself." *See* Respondents' Brief at 7, 12. As the experiences of numerous *amici curiae* clearly demonstrate, however, each new decision has wrought additional confusion and additional DOJ inconsistency. *See, e.g.*, Cinemark's *Amicus Curiae* Brief at 3-10 (discussing the DOJ's meandering interpretations of Section 4.33.3 and repeated efforts to avoid APA review and discovery in the Fifth Circuit, the Sixth Circuit, and their respective federal district courts); Hoyts' *Amicus Curiae* Brief at 3-19 (discussing how DOJ has varied its position on Section 4.33.3, as communicated on the DOJ's technical assistance ADA "helpline" and its shifting litigation positions in the First Circuit, the Second Circuit, and their respective federal district courts). Additional time will not resolve the present circuit conflict, it will simply do more damage to an industry already burdened with "impossible uncertainty."

Respondents' suggestion that review is unnecessary because "the Access Board might address this issue in the current round of revisions to the ADAAG" (Respondents' Brief at 7) is wholly disingenuous. Not only do Respondents engage in self-serving speculation, but they ignore the need to determine what the law was at the time the theaters in question were built. Nor will the Access Board have the final word on regulations concerning private facilities doing business as places of public accommodation (as opposed to federal funded buildings). Far from indicating any intention to resolve the pending controversy by formal rulemaking, the DOJ has denied an industry petition for rulemaking and ignored repeated admonishments by federal courts that it ought to have imposed its interpretation of Section 4.33.3 through notice and comment rulemaking. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92-93 (D. Mass. 2003) ("the Cinemas are not entirely wrong to castigate the Government for engaging in judicial legislation . . . [a]s matter of policy, the executive should be discouraged from attempting to get the courts do for it what it ought do for itself through the rulemaking

process"); *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.2 (D. Or. 2001) ("the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"); NATO *Amici Curiae* Brief at 3, App. 1a-21a (discussing the DOJ's denial of NATO's formal petition for rulemaking on Section 4.33.3 in April of 2003 and documenting the DOJ's statement that "the Department is planning to review and amend the ADA regulations in the next year," which the DOJ never did).

The consequences of this circuit conflict are obvious, severe, and pervasive. The legality of an entire industry's core public accommodation infrastructure is now put in jeopardy by a Ninth Circuit decision that has aptly been described as "unjust," "unreasonable," "irresponsible," and "no help at all to theater owners trying to comply with the law."[5] *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).[6]

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5. These criticisms, valid in their own right, have even greater significance when considered in the construction context presented here, where architects, builders, and owners responsible for designing and constructing public accommodations require full and fair notice of precise, objective standards that they can clearly understand and rely upon. *See Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 968 F. Supp. 210, 216 (D.N.J. 1997) ("If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations."), 217 ("[c]onsiderations of due process and the realities of building large, expensive facilities counsel against the courts making architectural, design or engineering judgments in the guise of statutory interpretation"), *aff'd in part, rev'd in part*, 193 F.3d 730 (3d Cir. 1999).

6. By opining that inconsistent interpretations of Section 4.33.3 "impose[] no greater burden on architects and interstate enterprises than they face all the time in seeking to comply with diverse local building codes" (Respondents' Brief at 12-13 n.4), Respondents ignore that Congress intended that *federal* accessibility regulations be stated clearly, with notice, and interpreted uniformly. Moreover, such a comment incorrectly presumes that the Ninth Circuit's *Stewmon* opinion is reasonably comprehensible in the first place, which it quite plainly is not. *See Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (characterizing the majority opinion as "vague" and questioning, "If a judge on the panel cannot say just what is required [by this decision], how can a movie theater owner?").

B. The Court Should Grant Certiorari To Resolve A Profoundly Important Circuit Conflict Regarding The Sources Of, And Limits On, Judicial Deference To Agency Interpretations Of Their Own Regulations.

Respondents' opposition to granting certiorari on the judicial deference issue presented by Regal is predicated exclusively on the argument that there is "no conflict in the circuits." *See* Respondents' Brief at 16. Yet, Respondents cannot seriously dispute that the Ninth Circuit majority and the Sixth Circuit both concluded that the DOJ's purported interpretation of Section 4.33.3 was deserving of deference.[7] These cases thus directly conflict with the Fifth Circuit's decision in *Lara*, 207 F.3d at 788-89, a case whose factual underpinnings could not have been more similar. Both *Stewmon* and *Lara* involved DOJ appearances as *amicus curiae* espousing a new interpretation of the same ADAAG construction standard.[8]

Similarly, in *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999), the Third Circuit rejected another DOJ "interpretation" of Section 4.33.3, as set forth in

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7. In *United States v. Cinemark*, the Sixth Circuit commented that "the DOJ's interpretation should be upheld unless it is "plainly erroneous or inconsistent with the regulation." *United States v. Cinemark*, 348 F.3d at 578-79. This statement does not even seem to require the low threshold of *reasonableness* of interpretation, as would be required if *Chevron*-type deference was warranted. *United States v. Cinemark*, 348 F.3d at 578-79. *See also Stewmon*, 339 F.3d at 1132. Accordance of greater than *Chevron* deference to an agency's informal litigating interpretation of a regulation certainly constitutes a conflict with numerous other cases discussed herein.

8. Moreover, the Ninth and Sixth Circuit decisions both failed to examine whether the DOJ was truly "interpreting" the language of Section 4.33.3, as opposed to amending the regulation. Such inquiry is a threshold issue implicitly recognized in *Lara*, 207 F.3d at 788-89, and in such cases as *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), and *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999). The mere fact that the DOJ called its new rule "interpretative" should not end the analysis. *See* Cinemark's *Amicus Curiae* Brief at 14-18. Furthermore, the Ninth and the Sixth Circuits also failed to give due effect to Title III's emphasis on the establishment of clear, authoritative, and prospective guidance to builders. *See* AMC and Lowe's *Amici Curiae* Brief at 8-20; NATO *Amici Curiae* Brief at 15-20.

a guidance manual. That court recognized that the DOJ was not free to amend through "interpretation" that which Congress decreed should be amended in accordance with the notice and comment procedures of the APA.[9]

The circuit conflict is broader than simply whether to defer to a DOJ interpretation of Section 4.33.3 of ADAAG. By deferring to a government agency under the circumstances here, the Sixth and Ninth Circuits stand in stark conflict with other cases in which courts have refused to give any deference, or accorded little deference, to government agency litigation positions and other informal pronouncements. In *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999), the Fifth Circuit expressly held that an agency litigation position was not entitled to deference. In a particularly detailed analysis, the Seventh Circuit declined to defer to an agency's litigation position purporting to interpret its own regulation in *Hoctor v. United States Department of Agriculture*, 82 F.3d at 172. Similarly, in *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d at 563, the same court accorded little deference to an agency's *amicus* brief. In *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000), the D.C. Circuit commented that litigating positions may not reflect the fair and considered judgment of the agency. *See also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997).

The conflict in the circuits seems to be rooted in how the lower courts reconcile *Auer v. Robbins*, 519 U.S. 452 (1997), with other pronouncements of this Court, including *Christensen v. Harris County*, 529 U.S. 576 (2000). As explained in a decision

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9. *But see Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584-85 (D.C. Cir. 1997) (reluctantly deferring to the DOJ's interpretation); *see also Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (rejecting the DOJ's interpretation). For a detailed analysis of the deference issues presented in the *Caruso* and *D.C. Arena* cases, see AMC and Loew's *Amici Curiae* Brief at 14-16. *See also* NATO *Amici Curiae* Brief at 17-19.

published just two days after Regal's petition for certiorari was filed:

> The government's interpretation of the scope of our review is not saved by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* because it is found only in a brief, and briefs, it seems, get limited deference. Our hedge ("it seems") is because *Auer v. Robbins* gave full *Chevron* deference to an agency's *amicus curiae* brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack of the force of law – do not warrant *Chevron*-style deference." Briefs certainly don't have "the force of law." . . . Probably there is little left of *Auer*. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys v. Barnhart, 347 F.3d 990, 993-94 (7th Cir. 2003) (citations omitted).[10] While the cases listed above do not comprehensively document the full circuit conflict on this issue, they provide ample examples for the fact that the issue is recurring and requires this Court's attention.

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10. Respondents' argument that the present case is an inappropriate vehicle for considering the deference to be accorded to agency litigating positions because "the regulation at issue here plainly compels the interpretation the Department of Justice has placed on it" (Respondents' Brief at 16 n.5) again inappropriately subsumes the review issue in a merits argument.

C. The Court Should Grant Certiorari To Resolve Circuit Disagreement Regarding Fair Notice And Constitutional Due Process Implications Of Permitting The Imposition Of Post-Construction Retrofitting Remedies.

The DOJ's belated, post-construction announcement of a "viewing angle" interpretation now subjects an entire industry to crushing retrofitting liabilities. *See* Regal's Petition at 7; Cinemark USA, Inc.'s *Amicus Curiae* Brief at 5-6; Hoyts Cinemas Corp.'s *Amicus Curiae* Brief at 11; NATO's *Amici Curiae* Brief at 6-7. It is a fundamental principle of fair governance that individuals be given fair notice of obligations. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995); *see also Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) ("the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires"). The decision below ignores this basic truth. *See also* AMC and Loew's *Amici Curiae* Brief at 16 n.11.

The fact that the federal courts cannot agree on whether a "viewing angle" requirement can lawfully be interpreted from Section 4.33.3 of ADAAG should preclude stadium-style movie theaters built prior to Regal's knowledge of the DOJ's "viewing angle" interpretation from being subjected to post-construction retrofitting remedies. The unfairly punitive implications of the *Stewmon* majority's decision prompted this comment from Judge Kleinfeld:

> [U]nder today's decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time. They must rebuild them to satisfy the architectural inferences design professionals will have to draw from today's opinion. Those inferences are obscure and debatable. . . . It is irresponsible to impose on

> the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done.

Stewmon, 339 F.3d at 1134 (Kleinfeld, J., dissenting). *See also* AMC and Loew's *Amici Curiae* Brief at 13 n.8. Review should be granted to protect designers, builders, and owners of places of public accommodation across the nation from these catastrophic retrofitting burdens.

CONCLUSION

The realities of designing and building places of public accommodation militate strongly against permitting governmental agencies to flexibly "interpret" new substantive construction requirements into existing regulations or allowing courts to use the guise of "broad" statutory and regulatory interpretation to justify post-construction second-guessing of architectural and engineering judgments. The Ninth Circuit's *Stewmon* decision has unfairly distressed an entire industry, portends ruinous financial consequences, and condemns builders across the nation to a state of paralyzing ambiguity. It is vitally important that the Court grant review and definitively resolve the present circuit conflicts by providing clear guidance on statutory and regulatory interpretation, agency deference, and the fair notice and due process implications of any retroactive remedy.

For the foregoing reasons, the Court should grant Regal Cinemas, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

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